Federal Court

Cour fédérale

Date: 20090827

Docket: IMM-1021-09

Citation: 2009 FC 845

Toronto, Ontario, August 27, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ANA MARGARITA VENTURA DE PARADA
JOSE ANTONIO PARADA GONZALEZ
PATRICIA MARLENE PARADA VENTURA
(A.K.A. PATRICIA MARLEN PARADA VENTURA)
MANUEL ALONSO GAMEZ PARADA
MARIANA PATRICIA PARADA
(A.K.A. MARIANA PATRICI PARADA)
ANA MARIA PARADA VENTURA
JOSE ALEJANDRO RIVERA CASTELLANOS
ALEJANDRO RIVERA PARADA

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ana Margarita Ventura De Parada, her husband, Jose Antonio Parada Gonzalez, daughters, Patricia Marlene Parada Ventura and Mariana Patricia Parada, son-in-law, Manuel Alonso Gamez Parada, and grand children, Ana Maria Parada Ventura, Jose Alejandro Rivera Castellanos and Alejandro Rivera Parada, are all citizens of El Salvador.

[2] They claimed refugee status in Canada. On January 23, 2009 the Refugee Protection Division of the Immigration and Refugee Board found the family to be neither Convention refugees under section 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, nor persons in need of protection under section 97 of the Act. The Applicants are asking the Court to quash that decision. For the reasons that follow, their application for judicial review is dismissed.

Background

[3] On April 15, 2006 the family began being attacked by armed members of the Mara Salvatrucha (MS) gang. Patricia was followed into the family home where she was attacked with a knife. The gang members demanded money from the family, and threatened them if they did not comply. The family was threatened with death if they contacted the police. On August 10, 2006 a home invasion occurred; the gang members took jewellery.

[4] On December 20, 2006, Jose Antonio began receiving phone calls at his place of business, demanding money under threat of death. Again, a warning not to contact the police was given. In

the beginning of 2007, two MS members came to his place of business and attempted to extort money, but Jose Antonio was not there. On January 15, 2007, another threatening phone call was received.

[5] The police were never contacted by any members of the family.

[6] Jose Antonio closed his business, and on January 28, 2007, fled with his wife Ana Margarita to Canada where the couple filed a claim for refugee protection. Their daughters, son-in-law, and grand children left El Salvador on January 28, 2007, and after a brief stay in the USA, arrived in Canada six weeks later where they too filed claims for refugee protection.

[7] The Board found the Applicants to be credible, and accepted the instances of violence and threats to which they testified. However, the Board rejected their refugee claims on the ground that the family "were victims of common and generalized crime rather than specific or personalized crime" and on the ground that the family "had not discharged their onus of showing clear and convincing evidence of the state's inability or unwillingness to protect them."

[8] The Board also held that the Applicants had not established a nexus between their fear and one of the five enumerated Convention grounds outlined in section 96 of the Act. Consequently, the Board proceeded to analyze the claim only on the basis of section 97(1). The Applicants do not challenge the finding of a lack of nexus to section 96.

[9] The Board observed that section 97(1)(b) does not extend protection to those facing a risk that is faced generally by others in the country. The Board examined and relied on the national documentation package for El Salvador, the testimony of the Applicants, and the Board's Response to Information Request in determining that the risk posed by the MS was one generally experienced by all El Salvadorians.

[10] The Board also concluded:

> Businesspeople, as in the case of Jose Antonio and his daughter, Patricia, whether they operate a business, work for a business or own and operate transportation units in El Salvador…face a prevalent or widespread risk of systematic extortion by the MS (or *maras*), as they are generally perceived to be wealthier than others. Resisting the MS (or *maras*) could result in violent reprisal from them.

[11] The Board cited *Vickram v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 457 for the proposition that where the risk faced by a business person in these circumstances is indiscriminate or random, and where the risk is no greater than that faced by the population at large, the requirement of particularized risk required to engage section 97(1) of the Act is not met. The Board concluded that the Applicant's case was analogous to that of *Vickram*, and held that section 97(1) protection was not available to them.

[12] The Board further held that even if generalized risk was not an issue, their claims would still fail because the Applicants had failed to rebut the presumption of state protection. The Applicants did not report any of the incidents and threats to the police or seek assistance from any other

authority or agency. Consequently, the Board held that the claimants had not lead clear and convincing evidence of a lack of state protection as is required by *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689.

[13] The Board stated the legal test for state protection as "adequate though not necessarily perfect", citing *Zalzali v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 605 (CA) and *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 99 D.L.R. (4th) 334 (F.C.A.) for the proposition that where a state has effective control over its territory, a law enforcement apparatus in place, and is making efforts to protect its citizens, the fact that it is not always successful in protecting an individual does not mean that a state cannot provide protection. The Board went on to cite the various efforts that the El Salvadorian government is taking to combat gang activity, relying on three separate Board Responses to Information Requests.

[14] The Board relying on *Kadenko v. Canada (Minister of Citizenship and Immigration)* (1996), 143 D.L.R. (4th) 532 (F.C.A.) stated that the claimant's burden of proof in rebutting the presumption of state protection is proportional to the democratic nature of the state. The Board held that El Salvador was a democratic country with functioning security forces and an established judiciary and judicial system. Lastly, the Board noted that refugee protection is a surrogate system of protection and found that "the claimants simply did not take the steps to reasonably exhaust the courses of action open to them to seek state protection in El Salvador prior to seeking international protection in Canada."

[15] Consequently, the Board determined that the Applicants are neither Convention refugees nor persons in need of protection.

Issues

[16] The Applicants raise two issues with respect to the decision under review:

a. Whether the Board erred in determining that the risk faced by the Applicants was generalized; and

b. Whether the Board based its state protection finding on an erroneous finding of fact without regard to the evidence before it.

Analysis

A. Generalized or Personalized Risk

[17] The Applicants assert that they were targeted by the MS because of their perceived wealth as business people. They submit that where a subcategory of people experience a heightened level of risk it cannot be said that they face a risk generally faced by others in the country: *Salibian v. Canada (Minister of Employment and Immigration)* (1990), 73 D.L.R. (4th) 551 (F.C.A.).

[18] The Respondent submits that risk resulting from criminal targeting of business people has been settled by recent jurisprudence as amounting to generalized, not personalized risk: *Prophète v. Canada (Minister of Citizenship and Immigration),* 2008 FC 331 aff'd 2009 FCA 31; *Cius v.*

Canada (Minister of Citizenship and Immigration), 2008 FC 1; *Vickram, supra*; and *Carias v. Canada (Minister of Citizenship and Immigration),* 2007 FC 602.

[19] The Applicants submitted that the determination made by the Board is to be assessed on the standard of reasonableness. I concur. When the question is whether the oral and documentary evidence points to particularized or generalized risk, then the standard of review is reasonableness, since this is a question of mixed fact and law.

[20] Despite the Applicants' insistence that their case is analogous to *Salibian*, it is not. *Salibian* dealt with an assessment of generalized risk under section 96 of the Act where the risk was linked to an enumerated ground. The Court held that "in order to claim Convention refugee status, there is no need to show either that the persecution was personal or that there had been persecution in the past" as long as the claimant can lead evidence that similarly situated individuals have experienced persecution based on an enumerated ground. The Applicants' claim deals with section 97(1) of the Act, and risk that is not based on an enumerated ground.

[21] In *Prophète*, Justice Tremblay-Lamer reviewed the personalized/generalized risk jurisprudence in relation to section 97(1). *Prophète* was a section 97(1) claim resulting from threats of kidnapping, where the Applicant argued that as a business person they were subject to an increased risk of kidnapping because of their membership in this particular subgroup. The analysis of Justice Temblay-Lamer is apposite:

18 The difficulty in analyzing personalized risk in situations of generalized human rights violations, civil war, and failed states lies in determining the dividing line between a risk that is "personalized" and one that is "general". Under these circumstances, the Court may be faced with applicant who has been targeted in the past and who may be targeted in the future but whose risk situation is similar to a segment of the larger population. Thus, the Court is faced with an individual who may have a personalized risk, but one that is shared by many other individuals.

19 Recently, the term "generally" was interpreted in a manner that may include segments of the larger population, as well as all residents or citizens of a given country. In *Osorio v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1459, [2005] F.C.J. No. 1792 (QL). In that case, the applicant asserted that if he and his young Canadian born son were returned to Colombia it would constitute indirect cruel and unusual treatment / punishment because of the psychological stress that he would experience as a parent worrying about his child's welfare in that country. At paras, 24 and 26 Snider J. stated:

> [24] It seems to me that common sense must determine the meaning of s. 97(1)(b)(ii) [...]
>
> [26] Further, I can see nothing in s. 97(1)(b)(ii) that requires the Board to interpret "generally" as applying to all citizens. The word "generally" is commonly used to mean "prevalent" or "wide-spread". Parliament deliberately chose to include the word "generally" in s. 97(1)(b)(ii), thereby leaving to the Board the issue of deciding whether a particular group meets the definition. Provided that its conclusion is reasonable, as it is here, I see no need to intervene. [Emphasis added by Tremlay-Lamer J]

Snider J. concluded that the Board had not erred in its determination given that the risk described by the applicant was one faced by all Colombians who have or will have children.

[…]

23 Based on the recent jurisprudence of this Court, I am of the view that the applicant does not face a personalized risk that is not faced generally by other individuals in or from Haiti. The risk of all forms

> of criminality is general and felt by all Haitians. While a specific number of individuals may be targeted more frequently because of their wealth, all Haitians are at risk of becoming the victims of violence.

[22] I agree with my colleagues that an increased risk experienced by a subcategory of the population is not personalized where that same risk is experienced by the whole population generally, albeit at a reduced frequency. I further am of the view that where the subgroup is of a size that one can say that the risk posed to those persons is wide-spread or prevalent then that is a generalized risk.

[23] That is precisely what the Board found in this case. The subgroup of the population of El Salvador that the Applicants were found to belong to was described by the Board as "business people" whom it stated were those who "operate a business, work for a business or own and operate transportation units in El Salvador." That is a very large subgroup, encompassing almost all in the country who legitimately work for a living. That determination, based on the evidence was not unreasonable; neither was the finding of generalized risk.

[24] The Applicants rely on the decision of Justice de Montigny in *Pineda v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 365. They submit that it dealt with the same issue as is present here. In *Pineda*, the claimant was a citizen of El Salvador the MS had attempted to recruit. When the claimant refused, he and his family were threatened, and their home was placed under surveillance. The RPD rejected the claim on the grounds that the risk faced was generalized and not personalized. In granting judicial review, Justice de Montigny stated:

> [T]he applicant had been threatened by a well-organized gang that was terrorizing the entire country, according to the documentary evidence, and in the same breath surmise that this same applicant would not be exposed to a personal risk if he were to return to El Salvador. It could very well be that the Maras Salvatruchas recruit from the general population; the fact remains that Mr. Pineda, if his testimony is to be believed, had been specifically targeted and was subjected to repeated threats and attacks. On that basis, he was subjected to a greater risk than the risk faced by the population in general.

[25] I agree with the result; however, the decision does not assist these Applicants. The issue as to whether the risk is personal or general in that fact situation is not determined by the fact that the MS recruits from the population generally; it is determined by the fact that the applicant had been personally targeted by the MS for reprisal because he refused to be recruited to their cause. That is a circumstance quite different from that before me in this application. Here the Applicants have not been targeted personally by the MS, rather they, as a part of a large group of business persons who are perceived to be well-off, have been targeted. That is a generalized and not a personalized risk.

B. State Protection

[26] Relying on *Ward*, the Applicants argue that where evidence suggests state protection would not reasonably be forthcoming there is no obligation on claimants to seek state protection prior to availing themselves of the surrogate of refugee protection. The Applicants submit that the Board failed to consider documentary evidence that would have resulted in a different conclusion on the availability of state protection.

[27] I agree with the Respondent that the Applicants failed to lead clear and convincing evidence rebutting the presumption of state protection. It was reasonable for the Board to consider the absence of a request for state protection in its analysis; it would have been an error to fail to do so.

[28] The Applicants explain their failure to seek state protection on the grounds that they were threatened, that they thought the state's ability to protect them would be ineffective, and that they thought the MS may have infiltrated the police. The Board noted the efforts that El Salvador has been making to combat gang violence, and determined that the Applicants had failed to rebut the presumption of state protection. The Applicants cite various documents that suggest these efforts have been less than effective, and submit that this evidence rebuts the presumption of adequate state protection.

[29] The documentary evidence before the Board shows a very serious criminal gang problem in El Salvador which despite the government's efforts remains very problematic. The documentary evidence does not establish victims of gang violence who sought police protection received none. Thus, based on the documentary evidence relied on by the Applicants, it cannot be objectively said that no protection would have been provided had they attempted to avail themselves of state protection. Nor can it be reasonably said on the evidence that it was unlikely that they would receive protection. The Applicants failed to lead clear and convincing evidence to rebut the presumption of state protection and the Board's conclusion was reasonable, and consequently cannot be set aside.

[30] For these reasons the application must be dismissed. Neither party proposed a certified question. There is none on these facts.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application is dismissed and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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